

IN THE ARMED FORCES TRIBUNAL

REGIONAL BENCH, KOLKATA.

OA (Appeal) No. 03 /2017
(MA 16 of 2017)

THE Eight ----- DAY OF MARCH 2019

PRESENT

HON`BLE DR(MRS) JUSTICE INDIRA SHAH, MEMBER(J)
HON`BLE LT GEN GAUTAM MOORTHY, MEMBER (A)

No.15780321F Ex GNR(OPR) INDAL KUMAR

..... **Applicant**

**By legal practitioner for
Applicant.**

Mr Aniruddha Datta .

- Versus -

1. Union of India, through the Secretary
Ministry of Defence, Government of India,
New Delhi – 110 011.
- 2.The Chief of Army Staff,
Army Headquarters
New Delhi – 110 011.
3. General Officer Commanding ,
Hq 101 Area, Shillong
4. The Officer Commanding, Troops, 1
Advance Base Workshop, EME, Narengi,
Guwahati.

..... **Respondents**

**By Legal Practitioner for the
Respondents**

Mr.Satyendra Agarwal.

ORDER

(Dr(Mrs) Justice Indira Shah)

1. By filing this M.A. under Section 22 of the AFT Act, 2007, the applicant has prayed for condonation of delay of 6 months and 25 days in filing the OA (Appeal) wherein he has challenged the sentence of dismissal from service passed against him by the Summary Court Martial vide order dated 26 June 2013 and the order dated 13 Dec, 2015 passed by the GOC-in-C, Eastern Command rejecting the applicant's petition under section 164(2) of the Army Act. The applicant in the O.A. has prayed to be reinstated in service with effect from the date of his dismissal from service with pay & allowances.
2. It is averred that although the order of the GOC-in-C, Eastern Command was passed on 31st December, 2015, however the applicant come to know of the said order only in mid February, 2016, as the said order was forwarded to him by 104 AD Regt's letter dated 4th February, 2016. The applicant who was suffering from financial hardship, somehow managed some fees to challenge the order and went to Delhi and consulted his lawyer, Ex Lt. Col. RK Rai. He was advised to file Original Application (Appeal) before the AFT Bench at Kolkota. He came back and fell sick. After arranging necessary funds and papers he met his Advocate at Kolkota and the learned counsel took some time to prepare his case and ultimately it was filed on 25th Jan, 2017.
4. The respondents in their affidavit-in-opposition have alleged that the cause of action for filing this OA accrued from the date of dismissal i.e. 26 June,2013 and therefore the delay is for 3 years 7 months. The inordinate delay is not explained properly and therefore, the application for condonation of delay is liable to be rejected.
5. Section 21 & 22 of the Armed Forces Tribunal Act, 2007 deal with the issue. These are set out as Under:-

"21. Application not to be admitted unless other remedies exhausted -

(1) The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of the remedies available to him under the Army Act, 1950(465 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), as the case may be, and respective rules and regulations made thereunder.

(2) For the purpose of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the Army Act, 1950 (46 of 1950) or Navy Act 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), and respective rules and regulations –

(a) if a final order has been made by the Central Government or other authority or officer or other person competent to pass such order under the said Acts, rules and regulations, rejecting any petition preferred or representation made by such person;

(b) where no final order has been made by the Central Government or other authority or officer or other person competent to pass such order with regard to the petition preferred or representation made by such person, if a period of six months from the date on which such petition was preferred or representation was made has expired.

22. Limitation. -

(1) The Tribunal shall not admit an application –

(a) in case where a final order such as is mentioned in clause (a) of sub-section (2) of section 21 has been made unless the application is made within six months from the date on which such final order has been made;

(b) in a case where a petition or a representation which as is mentioned in clause (b) of sub-section (2) of section 21 has been made and the period of six months has expired thereafter without such final order having been made;

(c) in a case where the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which jurisdiction, powers and authority of the Tribunal became exercisable under this Act, in respect of the matter to which such order relates and no proceedings for the redressal of such grievance had been commenced before the said date before the High Court.

(2) Notwithstanding anything contained in sub-section (1), the Tribunal may admit an application after the period of six months referred to in clause (a) or clause (b) of sub-section (1), as the case may be, or prior to the period of three years specified in clause (2), if the Tribunal is satisfied that the applicant had sufficient cause for not making the application within such period."

6. The applicant herein was dismissed from service on 26th June 2013 being sentenced by the SCM. He thereafter filed a petition under section 164(2) of the Army Act on 26th Aug, 2014 along with an application for condonation of delay in filing the application under section 164(2) of the Act. The petition filed by the applicant was considered by the GOC-in-C, EC and it was rejected. The order of GOC-in-C dated 31st December, 2015 was communicated to the appellant by 104 AD Regt.'s letter dated 4th Feb 2016 which was received by him sometime in mid Feb 2016.

7. Counsel for both sides have cited judgments to buttress their arguments.

8. It is settled law that if the Court finds that there has been no negligence on the part of the applicant and cause shown for the delay does not lack bonafides, then it may condone the delay. If on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his case, then it would be legitimate exercise of discretion not to condone the delay.

9. In the case of Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Others, Civil appeal No. 8183-8184 of 2013 arising out of S.L.P.(C) Nos. 24868-24869 of 2011, Hon'ble Supreme Court revisited the cases decided on the issue of condonation of delay and observed in para 15 as under :-

"15. From the aforesaid authorities the principles that can broadly be culled out are : -

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms 'sufficient cause' should be understood in their proper spirit, philosophy and purpose regard being had to be fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed to totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are : -

- (a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harboring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a case on merits is seminal to justice dispensation system.

(b) *An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.*

(c) *Though no precise formula can be laid down regard being had to be concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.*

(d) *The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed of course, within legal parameters."*

10. The cause of action for filing any representation in terms of Section 164(2) of the Army Act accrued on 26 June 2013 i.e. date of order/sentence of dismissal from service passed against the applicant. He filed his representation on 26 Aug 2014. This representation was considered and disposed of by the GOC-in-C, EC on 31 Dec 2015.

11. There is no dispute that the application under section 164(2) of the Army Act filed by the applicant was disposed of vide order dated 31st Dec, 2015 and it was communicated to applicant vide letter dated 4th February 2016. The applicant's averment that he received the letter some time in mid Feb 2016 is acceptable. According to applicant he was suffering from financial crises. After managing some funds he went to New Delhi in the month of Aug 2016.

12. In the case of Moniben Devraj Shah v. Municipal Corporation of Brihan Mumbai and the case of Bedabai v. Shantaram Baburao Patil it was observed that a distinction must be made between a case where the delay is inordinate and a case where the delay is for few days. Whereas in the former case the consideration of prejudice to other side will be relevant factor, in the latter case no such consideration arises.

13. The appellant ought to have filed the OA(Appeal) within six months with effect from the date of the order of the GOC-in-C, Eastern Command which was passed on 31 Dec 2015. Armed Forces Tribunal Act 2007 or the Army Act, 1950 are silent about exclusion of time in computing the period of limitation in such cases. Section 12 to 20

of the Limitation Act envisages the computation of exclusion of period of limitation. The applicant received the order against his petition under section 164 (2) of the Army Act in mid Feb 2016 and so, mid-Feb i.e. 15 February 2016 should be taken as the date for computing the period of limitation. As stated by the applicant, due to financial hardship, there was delay in filing the OA.

14. Admittedly service of the applicant was terminated. He moved to Delhi to consult his lawyer and as per the advice of his counsel he returned Kolkota and engaged his lawyer to file the OA. It is a settled law that no presumption can be attributed to deliberate causation of delay but gross negligence on the part of the counsel or litigant is to be taken note of. The explanation given by the applicant for condonation of delay deserves acceptance and accordingly we are inclined to condone the delay in filing the OA, as there is neither negligence nor inordinate delay on the part of the applicant. Thus the delay is condoned and MA application stands disposed of.

15. The respondents shall file counter affidavit in OA.

16. List the matter after eight weeks when the Division Bench re-assembles.

MEMBER (A)

MEMBER(J)

Mdb